

BEFORE THE  
CALIFORNIA APPRENTICESHIP COUNCIL

TEN BAY AREA COUNTIES REGIONAL  
ROOFING JOINT APPRENTICESHIP AND  
TRAINING COMMITTEE, SOUTHERN  
CALIFORNIA ROOFERS AND  
WATERPROOFERS JOINT APPRENTICESHIP  
AND TRAINING COMMITTEE,

Charging parties and appellants.

v.

INDEPENDENT ROOFING CONTRACTORS OF  
CALIFORNIA UNILATERAL APPRENTICESHIP  
COMMITTEE,

Respondent.

Case No. 99-07

DECISION

FACTS AND PROCEDURAL HISTORY

Prior to August 27, 1998, the Independent Roofing Contractors of California Unilateral Apprenticeship Committee ("IRCC"), was authorized by its standards to recruit apprentices in the Counties of Alameda, Contra Costa, Lake, Marin, Mendocino, Monterey, Napa, Sacramento, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Solano and Sonoma.

In August and December, 1998, the Division of Apprenticeship Standards ("DAS") approved revisions to IRCC's standards which allowed IRCC to expand its recruitment to El Dorado, Fresno, Kern, Placer, Stanislaus, Tuolumne and Yolo Counties. DAS did not give formal notification of the revisions to existing parties in the geographic area, including the Ten Bay Area Counties Regional Roofing Joint Apprenticeship and Training Committee, Southern California Roofers and Waterproofers Joint Apprenticeship and Training Committee ("Appellants").

1 whose authenticity cannot be reasonably be disputed, because the parties submitted extensive  
2 briefs and because the issues to be decided are primarily legal.

3 2. The record establishes that the 1998 revisions to the IRCC standards constituted a  
4 "new" program because the revisions changed the geographic area of the program.

5 3. Because the 1998 revisions constituted a new program, approval of the revisions was  
6 subject to Regulation 212.2. Regulation 212.2(f) requires DAS to give notice of an application  
7 for a new program to existing programs in the labor market area of the program. Appellants  
8 therefore were entitled to notice of the proposed revisions under Regulation 212.2(f). DAS did  
9 not give appellants such notice. Regulation 212.2 (j) requires an appeal from a DAS approval  
10 to be filed "within thirty days following service of the decision". DAS did not serve appellants  
11 with the decision approving the revisions until May 21, 1999. Under these circumstances,  
12 appellants' letter of February 19, 1999 should be considered as an appeal which was timely under  
13 Regulation 212.2(j).

14 Regulation 212.2 sets forth the procedure for the approval of a new program. DAS did  
15 not follow the this procedure in its 1998 approvals of the IRCC revisions. The approvals  
16 therefore are overturned because they are invalid. IRCC accordingly is authorized to operate its  
17 program only under its original standards as approved by the Council.

18 3. With respect to any apprentices whom IRCC recruited outside its original geographic  
19 area pursuant to the 1998 DAS approvals, the Council believes that it would be inequitable to  
20 transfer those apprentices to other programs, provided that those apprentices are being trained,  
21 educated and employed in accordance with law. The Council requests DAS to conduct an  
22 investigation of the training, educating and employment of those apprentices. The Council will  
23 retain jurisdiction over the question of what to do about those apprentices pending the results of  
24 DAS' investigation. If the investigation demonstrates that those apprentices are not being  
25 lawfully trained, educated or employed, the Council will issue further orders as necessary.

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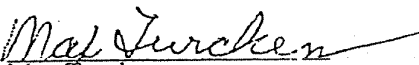
1 6. In view of this decision, it is unnecessary to decide whether appellants' complaint was  
2 timely under Regulation 201.


3 DATED: 1.26.01

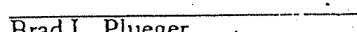
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CHAIRMAN, CALIFORNIA APPRENTICESHIP COUNCIL

5  
6 RECOMMENDATION

7 We recommend that the Council adopt the above decision.

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9   
10 Max Furchen

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12 Carole Cresci Colbert

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15 Brad L. Plueger

1 6. - In view of this decision, it is unnecessary to decide whether appellants' complaint was  
2 timely under Regulation 201.

3 DATED: \_\_\_\_\_

4 CHAIRMAN, CALIFORNIA APPRENTICESHIP COUNCIL

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6 RECOMMENDATION

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12 Carole Cresci Colbert

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14 Brad L. Plueger

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7/19/01

BEFORE THE  
ADMINISTRATOR OF APPRENTICESHIP OF THE  
STATE OF CALIFORNIA

SHEET METAL WORKERS' ) Case Nos. 97-S-11 and 99-13  
INTERNATIONAL ASSOCIATION LOCAL )  
UNION NOS. 104, 108 AND 162, )

Charging Party, )

vs. )

AIR CONDITIONING TRADES )  
ASSOCIATION UNILATERAL )  
APPRENTICESHIP COMMITTEE, )

DECISION

Respondents. )

*Amount against  
ACTA's expenses*

INTRODUCTION

Sheet Metal Workers' International Association Local Union  
Nos. 104, 108 and 162 (Charging Party) filed a complaint on  
June 11, 1997 and a second complaint on October 13, 1999, with  
the Division of Apprenticeship Standards ("DAS"). The  
complaints were designated as 97-S-11 and 99-13 respectively  
and were consolidated for hearing. Both complaints named Air  
Conditioning Trades Association Unilateral Apprenticeship  
Program as respondent ("ACTA UAP" or "Respondent").

DAS determined that some of the allegations in the  
complaints were untimely or lacked merit. DAS also determined  
that certain allegations did have merit and warranted a hearing  
and referred additional issues for hearing.

1 In summary, the issues DAS referred for hearing were the  
2 following:

3 1. Did ACTA UAP act in excess of its apprenticeship  
4 agreement, "Apprenticeship Standards of the Air Conditioning  
5 Trades Association Joint (sic) Apprenticeship & Training  
6 Committee" (Approved Standards or Standards) by recruiting  
7 apprentices outside of the geographic area provided for in its  
8 Standards? (Compl. #97-S-11, First Claim.)

9 2. Did ACTA UAP follow the procedures for the selection  
10 of apprentices set forth in its Approved Standards? (Compl.  
11 # 99-13, Second Claim.)

12 3. Did ACTA UAP utilize Local Educational Agencies (LEA)  
13 that were not approved as part of its Standards? (Compl. #97-  
14 S-11, Second Claim and Compl. #99-13, Third Claim.)

15 4. Did ACTA UAP use instructors that were not certified  
16 by an approved LEA? (DAS Acosta File, 97-S-11, Tab  
17 "Investigation.")

18 In addition, the Charging Party in its two complaints,  
19 which it sought to prosecute notwithstanding DAS' prior  
20 determination that they were without merit or were untimely,  
21 raised other allegations. In summary, they are:

22 1. ACTA UAP failed to provide related and supplemental  
23 instruction to apprentices on a frequent and continuing basis  
24 and reasonably proximate to where the apprentices' on-the-job  
25 training was taking place. (Compl. #97-S-11, Third Claim.)  
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1           2.    ACTA UAP did not maintain adequate records of on-the-  
2 job work hours and hours of related and supplemental  
3 instruction and did not maintain apprenticeship agreements.  
4 (Compl. #97-S-11, Fourth and Seventh Claim.)

5           3.    ACTA UAP did not pay or did not pay sufficient  
6 contributions to an employer benefit plan or plans as required  
7 by its Approved Standards. (Compl. #97-S-11, Fifth Claim.)

8           4.    ACTA UAP did not pay or require employers to pay  
9 apprentices the appropriate rate of compensation. (Compl. #97-  
10 S-11, Sixth Claim.)

11           5.    The Charging Party was not served with ACTA UAP's  
12 proposed revisions to its Approved Standards as required by DAS  
13 regulations. (Compl. #99-13, First Claim.)

14                               PROCEDURAL BACKGROUND

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16           On December 20, 2000, the Charging Party was informed by  
17 letter that a Hearing Officer was appointed to conduct the  
18 hearing as to both complaints. By letter of December 22, 2000,  
19 all parties were so notified.

20           One telephonic pre-hearing conference was conducted on  
21 January 19, 2001, with all parties, through their respective  
22 counsel, participating. During the pre-hearing conference the  
23 parties agreed to exchange documents they intended to rely upon  
24 in support of their positions. The parties were informed that  
25 the exchanged documents would be made part of the record. Each  
26 party exchanged documentary evidence in accord with their  
27 agreement prior to the hearing being scheduled.  
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1 transcript of the hearing, constitutes the record in this  
2 matter.

3 FINDINGS OF FACT

4 1. The "Apprenticeship Standards of the Air Conditioning  
5 Trades Association Joint Apprenticeship & Training Committee"  
6 was approved by the California Apprenticeship Council effective  
7 August 6, 1993.

8 2. The Standards provide at Article III that the  
9 geographic coverage is for the counties of Merced, Stanislaus,  
10 Mariposa and Tuolumne. The Addendum to the Apprenticeship  
11 Standards also defines the "Area Covered by Standards and  
12 Approved Statistical Area" as the counties of Merced,  
13 Stanislaus, Mariposa and Tuolumne.

14 3. The Standards (at Addendum II-"Affirmative Action  
15 Plan") provides for ACTA UAP's affirmative action goals as to  
16 minority and women apprentices. The goals and statistical  
17 bases for the goals are premised on the Standard's recruitment  
18 geographical coverage in Merced, Stanislaus, Mariposa and  
19 Tuolumne counties.

20 4. The Standards (at Addendum III - "Selection  
21 Procedures") provide that the "Selection of Apprenticeship  
22 Applicants will be Method Number Four (4)." The written  
23 selection procedure provides for minimum qualifications,  
24 selection devices, ranking, a description of procedures  
25 applicable to qualified applicants, how prior experience will  
26 be treated and a review process.  
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1           5.    The selection procedures under "Ranking" provide, in  
2 relevant part, that: "D. A ranked listed (sic) of eligible  
3 applicants will be established and maintained for two (2)  
4 years."

5           6.    The selection procedures under "Qualified Applicants"  
6 provide, in relevant part, that: "B. The JATC will refer  
7 qualified applicants to job openings by rank in descending  
8 order from the eligible list and will be sent to the employer  
9 for placement in the Apprenticeship Program."

10          7.    The Standards provide that "related instruction will  
11 be supplied by the Modesto Junior College."

12          8.    Notwithstanding the provision in the written Approved  
13 Standards, ACTA UAP either utilized Local Educational Agencies  
14 (LEA) or had agreements with LEAs to provide related  
15 instruction not within the Modesto Junior College District.  
16 These LEAs included: Fresno County Office of Education/Fresno  
17 Unified School District; Martinez Unified School District/Adult  
18 Education; San Juan Unified School District; Santiago Canyon  
19 College (Orange County); and Sacramento City College.

20          9.    ACTA UAP entered into an agreement with Martinez  
21 Unified School District for that institution to act as ACTA  
22 UAP's LEA. The agreement provided, in part, that ACTA UAP was  
23 to "secure necessary credentials for the instructors as  
24 required by the District (Martinez Unified School District) and  
25 by California law."  
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1        10. ACTA UAP's instructors Dale Armstrong, Hal Scholl,  
2 Steve Torres and Baburaj Dharani were not certified by Modesto  
3 Junior College or by Martinez Unified School District to  
4 provide instruction. E. Dale Armstrong, however, did hold a  
5 Community College Instructor Life Credential, and Harold P.  
6 Scholl held a teaching credential issued by the Commission on  
7 Teacher Credentialing. ACTA UAP did have some attendance forms  
8 showing that certain apprentices attended classes at several  
9 locations within the Martinez Unified School District,  
10 including Hoover High School and at a private residence.

11        11. ACTA UAP submitted a petition in letter form dated  
12 May 12, 1994, to the Chief of DAS to "expand the Air  
13 Conditioning Trade Association Unilateral Training Committee's  
14 geographic area to include the forty-six (46) Northern  
15 California Counties. (Tulare-Kings County north to Oregon)."  
16 Chief of DAS has not yet approved that petition. There were  
17 other revised standards used by ACTA UAP which do not show the  
18 signature of DAS' chief approving the revisions. A revision of  
19 August 1, 1997 was sent to the Los Angeles Unified School  
20 District. This revision shows the purported signature of Len  
21 Viramontes, Senior Apprenticeship Consultant for DAS, but does  
22 not show the required signature of DAS' chief. Also, ACTA UAP  
23 produced a revision to its standards dated April 20, 1998.  
24 Similarly, this revision shows the purported signature of Len  
25 Viramontes, but not that of DAS' chief.  
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1       12. On February 3, 1997, DAS' chief approved a "revision  
2 of Approved Standards" (DAS Form 24). That revision continued  
3 to list the areas covered as Mariposa, Merced, Stanislaus and  
4 Tuolumne counties and the school as Modesto Junior College.

5       13. Communications took place between DAS and ACTA UAP  
6 regarding revisions to ACTA UAP's Approved Standards. These  
7 communications show that the approval process was ongoing, at  
8 least through the dates of the correspondence.

9       14. On May 29, 1996, DAS informed ACTA UAP by letter that  
10 "in order for ACTA to continue its geographic expansion outside  
11 its approved area, it is imperative that you submit revisions  
12 to standards which reflect labor market serviced." On June 7,  
13 1996, ACTA UAP submitted its proposed revisions to DAS.

14       15. On July 2, 1996, DAS informed ACTA UAP by letter that  
15 the proposed revisions were returned as not approved.

16       16. On January 16, 1997, DAS sent ACTA UAP a certified  
17 letter notifying ACTA UAP that the apprenticeship program would  
18 be deregistered unless corrective action was taken within 30  
19 days. The letter states that ACTA UAP violated federal and  
20 state law and regulation "and is not being operated in  
21 accordance with the approved program standards as required by  
22 state and federal law and regulation." The bases for the  
23 violations were that ACTA UAP failed to follow its selection  
24 procedure and that apprentice and program records were not  
25 being maintained. On January 31, 1997, ACTA UAP responded,  
26 also by letter, stating that it would conform its selection  
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1 There was no request to leave the record open for additional  
2 evidence, there was no agreement of the parties that additional  
3 new evidence could be received and there has been no showing  
4 that this proffered evidence was somehow unavailable to ACTA  
5 UAP prior to the close of the hearing.

6 ACTA UAP also references, but does not attach, the  
7 declaration of Henry S. Nunn allegedly submitted in another  
8 pending proceeding between these parties. (Respondent's Op.  
9 Br. at page 5.)<sup>3</sup>

10 The parties were allowed to attach or reference the  
11 pending civil writ proceedings, no representation was made as  
12 to what weight, if any, would be given to those references. In  
13 this situation, however, Mr. Nunn's declaration is not  
14 admissible. Even though the hearing was not conducted  
15 "according to technical rules relating to evidence and  
16 witnesses" (section 202(b)(3)), it is unfair to allow testimony  
17 submitted by way of declaration after the record is closed and  
18 where the parties neither consented to that submission nor had  
19 the opportunity to examine the declarant.  
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25 <sup>3</sup> Petition for Preemptory Writ of Mandate, Air Conditioning  
26 Trades Association Unilateral Apprenticeship Committee v.  
27 Division of Apprenticeship Standards, Henry P. Nunn and  
28 Sheetmetal Workers International etc. et al. San Francisco  
Superior Court Case No. 318718. Although the Hearing Officer  
did receive courtesy copies of some of the pleadings in the writ  
proceeding, declarations were never submitted.

1 5. Are the Parties Entitled to Receive the Hearing Officer's  
2 Proposed Decision Prior to the Issuance of the Final  
3 Decision by the Director of the Department of Industrial  
4 Relations?<sup>4</sup>

5 At the conclusion of the hearing, ACTA UAP requested that  
6 the Hearing Officer's proposed decision be given to it. This  
7 oral request was followed by a letter of May 9, 2001.

8 Under section 202(c) and (d), the Administrator of  
9 Apprenticeship issues a decision on the complaint based on the  
10 entire record and after considering the Hearing Officer's  
11 written recommendations. There is no final decision until one  
12 is issued by the Administrator of Apprenticeship.

13 There is nothing in statute or regulation, nor has ACTA  
14 UAP offered any authority, that provides that a party is  
15 entitled to receive the Hearing Officer's recommendations or  
16 proposed decision. There is, however, authority to the  
17 contrary. In Bollinger v. San Diego Civil Service Commission  
18 (1999) 71 Cal.App.4th 57-577, 84 Cal.Rptr.2d 27, the court held  
19 that a party had no right to receive a Hearing Officer's  
20 proposed decision. In addition, citing to Dami v.

21 Dept. of Alcoholic Bev. Control (1959) 176 Cal.App.2d 144, 154,  
22 1 Cal.Rptr. 213, the court also recognized that there was no  
23 constitutional principle implicated by not giving a party a  
24 proposed decision.

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27 <sup>4</sup> The regulations use the terminology of "Administrator of  
28 Apprenticeship." Under Labor Code section 3072 "The Director of  
Apprenticeship and is authorized to appoint such assistants as  
shall be necessary to effectuate the purpose of this chapter."

1           Consequently, neither the Respondent nor any party is  
2 entitled to receive the proposed decision.

3   6.   ACTA UAP's Assertion That the Complaints are Untimely.

4           Based on the testimony of Mr. Paul McDonald Harrison  
5 concerning his involvement with ACTA UAP training programs from  
6 1995 to 1998, ACTA UAP asserts that the complaints are untimely  
7 and should be dismissed. Section 201(a) provides for time  
8 limitations for the filing of complaints based on various  
9 violations. A complaint is issued "when there is cause to  
10 believe that a decision, order or action of an apprenticeship  
11 program sponsor has been unfair or unreasonable; or that there  
12 has been a violation of: ...[regulations and agreements]."

13           No evidence was proffered, however, as to when Charging  
14 Party had or should have had "cause to believe" that some  
15 violation had occurred. A witness's testimony that there were  
16 violations covering a broader period of time than that  
17 suspected by a complainant would not retroactively trigger the  
18 statute. It would still need to be shown, by competent  
19 evidence, that the complainant had "cause to believe" that a  
20 violation occurred and failed to take action within the  
21 applicable period. Since, ACTA UAP failed to proffer any  
22 evidence to show that Charging Party had "cause to believe"  
23 within either a 30- or 180-day period that a violation  
24 occurred, the argument is rejected.  
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1 B. ACTA UAP'S USE OF LEAS, INSTRUCTOR QUALIFICATION AND  
2 FREQUENCY AND LOCATION OF RELATED TRAINING.

3 The Approved Standards for ACTA UAP provide that "related  
4 instruction will be supplied by Modesto Junior College." ACTA  
5 UAP had, for some time beginning in 1994, attempted to change  
6 its Standards. For the most part, DAS approval has not been  
7 forthcoming. There are certain revisions to the Standards  
8 showing that some changes, not relevant here, were approved by  
9 DAS, but which also show that Modesto Junior College continued  
10 to be the only approved LEA listed.

11 There is ample evidence that ACTA UAP did use LEAs other  
12 than Modesto Junior College. ACTA UAP submitted numerous  
13 documents that it had entered into or was attempting to enter  
14 into agreements with educational agencies other than Modesto  
15 Junior College to provide for related instruction. These  
16 agreements may be a prerequisite to obtaining DAS approval of  
17 amended Standards, but DAS approval is still required. In this  
18 case, Modesto Junior College remains the only approved LEA and  
19 ACTA UAP's use of other LEAs even if furnished pursuant to  
20 agreement between ACTA UAP and those educational agencies, is a  
21 violation of ACTA UAP's Approved Standards.  
22

23 Since ACTA UAP's use of Martinez Adult School violates its  
24 Standards, the use of alternate class locations, such as Hoover  
25 High School, is subsumed within the violation of its Standards  
26 whether Martinez Adult School approved of the practice or not.  
27 In other words, the use of alternate class locations will not  
28 be treated as separate and distinct violations.

1 In addition, testimony established that instructor  
2 certification is a determination made by the individual LEA and  
3 not DAS. The agreement between ACTA UAP and Martinez Unified  
4 School District, for example, provides that the "[p]rogram  
5 sponsor shall secure necessary credentials for the instructors  
6 as required by the District [Martinez Unified School District]  
7 and by California law." Here, there was no evidence proffered  
8 to show what the District's requirements were and if ACTA UAP's  
9 instructors fulfilled those requirements. At best, ACTA UAP  
10 offered a letter from Tulare County Office of Education to the  
11 effect that E. Dale Armstrong held a Community College  
12 Instructor Life Credential and that Harold P. Scholl held a  
13 teaching credential issued by the Commission on Teacher  
14 Credentialing. ACTA UAP also offered documents reflecting  
15 student attendance at classes and names of instructors. None  
16 of these documents, however, show that Mr. Scholl and Mr.  
17 Armstrong or other instructors were certified by the school  
18 district.<sup>5</sup>

20 Apart from the issue of LEA certification of instructors,  
21 DAS also contends that the quality of instruction was  
22 deficient. Neither DAS nor the Charging Party met its burden  
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27 <sup>5</sup> Testimony established that Mr. Baburaj Dharani also  
28 served as an instructor for ACTA UAP. Since documents relating  
to Mr. Dharani were not timely submitted, they are not  
considered.



1 concerning the quality of instruction provided by ACTA UAP's  
2 instructors. The testimony of witnesses Mark Joseph Oaxaca and  
3 Jaima Garcia Vuscanamte as to the quality or lack of quality of  
4 instruction is given no weight since the witnesses were not  
5 shown to be competent to testify as to instructor qualification  
6 requirements and whether the instructors met those  
7 qualifications. The witnesses' mere preferences or opinions as  
8 to teaching ability or ability to communicate are insufficient  
9 to show that the witnesses are competent to testify as to even  
10 minimum instructor qualifications.<sup>6</sup>

12 Charging Party also failed to produce sufficient evidence  
13 to meet its burden with respect to its allegation that ACTA UAP  
14 failed to provide related and supplemental instruction on a  
15 frequent and continuing basis and at locations proximate to the  
16 on-the-job training. There was testimony that related and  
17 supplemental shop instruction was provided at several  
18 locations. While not specifically delineated, that training  
19 occurred on some periodic or even regular basis. This  
20 testimony contradicts the substance of the allegations and,  
21 consequently, Charging Party's allegations in this regard  
22 cannot be sustained.

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27 <sup>6</sup> Documents submitted by DAS as part of its investigative  
28 summaries included the declaration of Charles Whitehead. Since  
Mr. Whitehead was not called as a witness, the declaration was  
not considered.

1 C. ACTA UAP'S COMPLIANCE WITH ITS PROCEDURES FOR SELECTION OF  
2 APPRENTICES.

3 Section 205(f) and 215, provide certain requirements that  
4 procedures for the selection of apprentices be included as a  
5 part of a program's standards. At a minimum, those procedures  
6 must be in writing, comply with Federal regulation and must be  
7 approved by DAS' chief. That is, the selection procedure must  
8 be spelled out in writing as part of a program's approved  
9 standards. 29 Code of Federal Regulations section 30.5(b)(1)-  
10 (4) spells out allowable selection procedures. Under

11 subparagraph (4) "A sponsor may select apprentices by means of  
12 any other method [other than subsections (1) through (3) of  
13 that section including its present selection method..."

14 Accordingly, a plan may use a method of apprenticeship  
15 selection different than that provided in subsections (1)  
16 through (3) of 29 CFR 30.5(b), but that method must still be  
17 detailed in writing and be given DAS' approval.

18 ACTA UAP did spell out its selection procedure in writing  
19 and received DAS approval for that procedure. In summary, ACTA  
20 UAP's selection procedures provide for: minimum qualifications  
21 as to age, education, ability to perform physical labor and  
22 read, write and speak English; selection devices, that is,  
23 allocating point values to five categories derived from the  
24 applicant's oral interview; ranking, including notice provision  
25 and establishing a listing of eligible applicants that will be  
26 maintained for two years; a procedure for the referral of  
27 applicants to employers based on the applicant's rank on the  
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1 eligibility list; provisions for granting credit based on prior  
2 experience; and a provision to review the selection procedure  
3 to determine if the selection procedures adversely affect  
4 individuals based on sex or ethnicity.

5       ACTA UAP's utilization of any other selection method not  
6 in writing and not approved by DAS would be a violation of  
7 regulation and its Approved Standards. Even though evidence  
8 established that ACTA UAP has attempted to amend or revise its  
9 selection procedures, there was no evidence proffered  
10 establishing that any revision of the original selection  
11 procedures was ever approved by DAS.

12       Here, Mr. Paul McDonald Harrison credibly testified that  
13 the procedures actually used for apprentice selection were  
14 based on referrals from employers. That is, participating  
15 employers would refer their current employees to be enrolled in  
16 ACTA UAP's apprenticeship training program. The referred  
17 employees would be orally interviewed. After the oral  
18 interviews and the submission of paperwork, about 99 percent of  
19 those referred would be enrolled as apprentices. An  
20 eligibility list was not maintained or used. Since the  
21 individual apprentices were already employed, the  
22 apprenticeship program did not refer apprentices to jobs or  
23 maintain a referral list of eligible apprentices. The  
24 testimony of Jaima Garcia Vuscanamte, based on his personal  
25 experience, confirmed that this selection process was also used  
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1 to select him into the ACTA UAP apprenticeship program in the  
2 Los Angeles area.

3 ACTA UAP did not proffer any evidence to rebut this  
4 testimony or to show that this method of selecting apprentices  
5 was an aberration.

6 Based on the submitted evidence, therefore, ACTA UAP  
7 violated its Approved Standards by not following the procedures  
8 established for the selection of apprentices. Referral lists  
9 were not maintained, and apprentices were not referred to jobs.  
10 Rather, apprentices were selected and obtained from an existing  
11 employee work force based on employer referrals. Apprentice  
12 referrals and the maintenance of eligibility lists were thus  
13 not needed or used.

14 ACTA UAP agreed to conform to a particular selection  
15 process that was memorialized in writing in its Approved  
16 Standards. Violation of the approved selection process is not  
17 excused or minimized simply because the process actually used  
18 might have been appropriate or approved by DAS under a  
19 different factual scenario.

20 ACTA UAP argued that, at least two selection processes  
21 pre-existed DAS approval of its Standards and could be used  
22 without first obtaining DAS approval. One process is known as  
23 a "hunting license" by which apprentices find their own  
24 employer to work for as opposed to being referred to that  
25 employer by an apprenticeship program. Another selection  
26 process, known as "grandfathering," enables an apprentice to  
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1 work for his or her existing employer rather than be referred  
2 to a different employer. ACTA UAP, however, failed to produce  
3 any evidence that any other selection process obtained DAS  
4 approval and was included in writing as part of its Standards.<sup>7</sup>

5 **D. ACTA UAP'S RECRUITING OF APPRENTICES OUTSIDE OF THE**  
6 **GEOGRAPHICAL AREA IMPOSED BY ITS STANDARDS.<sup>8</sup>**

7 ACTA UAP's Approved Standards state that the geographic  
8 coverage is for counties of Merced, Stanislaus, Mariposa and  
9 Tuolumne. This same geographic area also forms the statistical  
10 basis for affirmative action purposes.

11 It is undisputed that ACTA UAP enrolled new apprentices  
12 who resided in areas outside of the four-county limitations  
13 contained in the Approved Standards. In addition, ACTA UAP  
14 advertised outside of the four-county areas and had outside of  
15 area training committees. Many of the apprenticeship  
16 agreements (DAS Form 1), some dating back to 1994, show that  
17 the apprentices' residences were outside of the four-county  
18 area, and the agreement to train apprentices (DAS Form 7) were  
19 signed by employers outside of the four-county limitation.<sup>9</sup>

21  
22 <sup>7</sup> ACTA UAP argues that some sort of underground regulation  
23 was being fostered by DAS with respect to "grandfathering." This  
24 is based on a misreading of Ms. Acosta's testimony. Based on  
the question asked, Ms. Acosta was speculating on what types of  
selection processes might be approved by DAS.

25 <sup>8</sup> Since not defined by regulation or statute, the  
definition of "recruitment" is that found at Webster's Third New  
International Dictionary, Unabridged (1967) at p. 1899.

26 <sup>9</sup> Interestingly, many of the DAS Form 7's submitted by ACTA  
27 UAP show an expanded geographic coverage under "Area covered by  
Apprenticeship Standards" by listing "California," "All of  
California," or by adding counties in addition to the four  
28 counties actually listed in the Approved Standards. There was  
no evidence submitted that DAS specifically approved of any

1 ACTA UAP asserts that its use of certain selection  
2 procedures justifies the enrollment of out-of-area apprentices.  
3 There is nothing cited by ACTA UAP in regulation or in its  
4 Approved Standards that modifies geographic area by reference  
5 to selection methodology. Thus, the geographic coverage is not  
6 expanded by reference to any particular selection method or by  
7 where an enrolled apprentice is sent to work.<sup>10</sup>

8 Also, ACTA UAP claims that its efforts to sign up new  
9 employers to participate in the apprenticeship training  
10 programs was not an active recruitment of apprentices outside  
11 of the approved geographic area. This correct assertion,  
12 however, does not address the issue.

13  
14 The problem is that ACTA UAP's procedure of having  
15 employers refer employees to participate in apprenticeship  
16 training as a part of the apprentice selection process, in this  
17 case, effectively operates as form of out-of-area recruitment.  
18 The result of this selection method, as seen in the DAS Form  
19 1's and 7's, is that since an employer is out-of-area, the  
20 referred employee will usually also reside out-of-area. It  
21 does not matter whether this is termed active or passive  
22

23 geographic expansion or that approval could be obtained by  
24 simply listing greater geographic coverage on a Form 7.

25 <sup>10</sup> ACTA UAP misinterprets Lucille Acosta's, DAS' Area  
26 Administrator for Field Offices, testimony in this regard. Ms.  
27 Acosta testified that an apprentice can work or be trained by  
28 correspondence courses anywhere in the State. Ms. Acosta did  
not testify that working after an apprentice was already  
enrolled in a training program was the same as recruiting  
apprentices outside of the geographic area by the apprenticeship  
committees or training programs.

1 recruitment since the process results in a violation of the  
2 Approved Standards through the enrollment of apprentices who  
3 reside outside the geographic areas as defined in the Approved  
4 Standards.

5 Accordingly, ACTA UAP violated its Approved Standards by  
6 recruiting and accepting enrollment of apprentices who resided  
7 outside of the four-county area set out in the Approved  
8 Standards.

9  
10 ACTA UAP argues, however, that compliance with its  
11 Approved Standards should be waived or violation of its  
12 Approved Standards excused.

13 1. Constitutional Issues Raised by ACTA UAP.

14 ACTA UAP argues that the geographic coverage in the  
15 Approved Standards operate as an infringement on the  
16 constitutionally protected right to travel. ACTA UAP also  
17 argues that the geographic coverage in the Approved Standards  
18 that form the statistical basis for compliance with the  
19 affirmative action plan is also unconstitutional under City of  
20 Richmond v. J.A Crossen, 488 U.S. 469 (1989). In Southern  
21 California Labor Management Operating Engineers Contract  
22 Compliance Committee v. Lloyd W. Aubry, Jr. (1997) 54  
23 Cal.App.4th 873,887, 63 Cal.Rptr.2d 106, the Court held that  
24 "California Constitution, article III, section 3.5 provides  
25 that an administrative agency has no power to refuse to enforce  
26 a statute on the grounds it is unconstitutional or conflicts  
27 with federal law, until an appellate court has so held.  
28

1 (Citation omitted.)" Accordingly, ACTA UAP's arguments in this  
2 regard will not be addressed.

3 2. ACTA UAP's Contention That DAS' Conduct Should Equitably  
4 Estop DAS From Enforcing ACTA UAP's Approved Standards.

5 The evidence presented does not justify, under the  
6 doctrine of equitable estoppel, excusing ACTA UAP's compliance  
7 with its own Approved Standards or the necessity of obtaining  
8 DAS' approval to revise its Standards in terms of geographic  
9 recruiting areas.

10 Equitable estoppel is rarely invoked against a  
11 governmental agency (La Societe Francaise v. Cal. Emp. Com.  
12 (1943) 56 Cal.App. 2d 534, 555), and will not be invoked if the  
13 result will be to frustrate a strong public policy. In Re  
14 Monigold (1988) 205 Cal.App. 3d 1224, 253 Cal.Rptr. 120, 122.  
15 The court in Manigold, held that the elements of estoppel must  
16 also be present. These elements, in addition to government  
17 action, are: the governmental agency must be apprised of the  
18 true facts; the governmental agency must have intended the  
19 party to rely upon its conduct; the party must be ignorant of  
20 the true facts; and the party must rely on the agency's conduct  
21 to its detriment. Id.

23 Here, the evidence is simply insufficient to support the  
24 application of equitable estoppel against DAS. There was no  
25 testimony or evidence that DAS gave some affirmative  
26 representation to ACTA UAP or even that ACTA UAP believed that  
27 DAS approval of its proposed revisions had occurred, was no  
28 longer necessary or that ACTA UAP no longer needed to abide by



1 its Approved Standards. There was no testimony or evidence  
2 that ACTA UAP placed any reliance on or altered its conduct in  
3 reliance on DAS' processing of apprenticeship agreements (DAS  
4 Form 1's) or any of DAS' internal memoranda.

5 Also, there was no evidence submitted that any of the  
6 internal memoranda circulating within DAS concerning approving  
7 apprenticeship agreements were ever actually communicated to  
8 ACTA UAP.<sup>11</sup> In this regard, ACTA UAP suggests that Mr.  
9 Viramontes would have supported ACTA UAP's position had he been  
10 called to testify. Neither DAS nor the Charging Party was  
11 compelled to call Mr. Viramontes as a witness and no negative  
12 inferences will be drawn from their decision not to do so.

13 ACTA UAP's citation to Sawyer v. City of San Diego (1956)  
14 138 Cal.App. 2d 652 and La Societe Francaise v. Cal.Emp.Com.,  
15 supra, does not change this analysis since the cases are  
16 distinguishable. In La Societe, the governmental taxing  
17 authority actually issued an official ruling as to the  
18 employers obligation regarding tax withholds that the employer  
19 relied upon. In Sawyer, there was a long history (36 years) of  
20 the City's acquiescence in water usage coupled with the City's  
21 agreement to supply water. Here, there is no specific act,  
22  
23

24 <sup>11</sup> Even had the internal memoranda been given to ACTA UAP,  
25 those memoranda cannot be read as suggesting that the Approved  
26 Standards no longer controlled, or that DAS's approval of the  
27 apprentice agreements excused compliance. This is true as to  
28 Mr. Viramontes' September 18, 2000, "To Whom It May Concern"  
letter as well (Resp. 22). Mr. Viramontes does not say that  
ACTA UAP is excused from complying with its Approved Standards  
and, in fact, seemingly references those Standards by citing to  
DAS's file number for ACTA UAP.

1 agreement, or long continuing conduct on DAS' part that would  
2 lead ACTA UAP to reasonably believe that it could ignore its  
3 Approved Standards with respect to geographic coverage.

4 E. ALLEGATIONS REGARDING RECORDKEEPING AND FAILURE TO PAY  
5 WAGES AND CONTRIBUTIONS.

6 There was insufficient evidence submitted to support  
7 Charging Party's allegations that apprentices were not paid the  
8 appropriate wages in accordance with the Standards and  
9 apprenticeship agreements. Other than addressing an isolated  
10 instance, testimony did not establish any pattern of conduct  
11 relating to wage payments nor were any documents produced to  
12 establish what amounts were paid in comparison to that which  
13 was allegedly owed for a given period.

14 There was no evidence submitted as to contributions to  
15 training funds. Consequently, all allegations relating to  
16 failure to pay to the correct entity or to pay appropriate  
17 amounts were not proven and must be dismissed.<sup>12</sup>

18 F. NOTIFICATION TO THE CHARGING PARTY REGARDING ACTA UAP'S  
19 PROPOSED REVISIONS.

20 The parties did not address this issue in their briefs  
21 even though raised in Charging Party's second complaint (99-13,  
22 First Claim) and addressed by DAS in its investigative  
23 findings. (DAS Folder 99-13.) In any event, there is  
24

25  
26  
27 <sup>12</sup> In light of the dismissal it is not necessary to address  
28 ACTA UAP's argument that the Charging Party raised an issue of a  
violation of fiduciary duty under ERISA, which is preempted by  
federal law.

1 Each party was also given the opportunity to provide the  
2 Hearing Officer and each other party with a position letter  
3 outlining their respective factual and legal positions with  
4 respect to any issue raised in the complaints, including those  
5 determined to be without merit or untimely by DAS. Only the  
6 Charging Party provided its position statement dated February  
7 21, 2001.

8 The parties were notified by letter of March 9, 2001, that  
9 the hearing was scheduled for April 10 and 11, 2001. The  
10 hearing was held before the Hearing Officer on April 10, 2001  
11 and April 11, 2001, and was transcribed by a certified court  
12 reporter.  
13

14 Each party was given an opportunity to and did submit  
15 documentary evidence prior to the hearing. In addition, during  
16 the hearing each party had the opportunity to present  
17 witnesses, to cross-examine witnesses and to present additional  
18 documentary evidence. Post-hearing argument, by agreement of  
19 the parties, was submitted in written form. Each party had the  
20 opportunity to and did submit written briefs and reply briefs.  
21 The last post-hearing reply brief was served on June 4, 2001  
22 and received by the Hearing Officer on June 7, 2001. By  
23 agreement of the parties, the matter was submitted for decision  
24 upon receipt of the last reply brief on June 7, 2001.  
25

26 The documentary evidence submitted by the parties prior to  
27 and at the time of the hearing as well as the written briefs  
28 (with an exception discussed below), together with the

1 insufficient evidence presented to make a finding as to this  
2 allegation. Section 212(f) provides that the proposed  
3 standards shall be served "on the sponsor of each existing  
4 program in the apprenticeable occupation in the labor market  
5 area of the program, as defined by section 215...." The  
6 evidence submitted suggests that ACTA UAP's proposed standards  
7 were incomplete and returned without action. Without more, it  
8 cannot be determined what status, if any, was accorded ACTA  
9 UAP's proposed revised standards, or even if the proposal was  
10 complete within the requirements of section 212. Consequently,  
11 Charging Party did not meet its burden with respect to this  
12 claim.<sup>13</sup>

14 G. REMEDIES.

15 Charging Party suggests that deregistration is the  
16 appropriate remedy for the violations alleged. Deregistration  
17 is within the province of the Chief of DAS under the procedures  
18 set forth in section 212.4. Section 212.4(b)(1) provides, in  
19 part, that the program sponsor be notified of a violation and  
20 the action needed to correct the violation "in writing sent by  
21 registered or certified mail, with return receipt requested."  
22 A second notice is required under Section 212.4(b)(3) in the  
23 event the program sponsor fails to correct the identified  
24 violations. While the first notice was sent to ACTA UAP in  
25 January 1997, there was no evidence submitted that DAS complied  
26

27 <sup>13</sup> DAS' conclusion, however, that service is not required  
28 until DAS approves the requested geographic expansion appears to  
run contrary to the actual requirements of Section 212(f).

1 with the second notice provision set out under section  
2 212.4(b)(3), or that other notices in compliance with  
3 regulation were subsequently sent to ACTA UAP. Consequently,  
4 deregistration cannot be ordered.

5 This decision, however, together with the entire record  
6 will be made available to the Chief of DAS for purposes of  
7 determining if deregistration is appropriate given the findings  
8 set forth herein that ACTA UAP failed to abide by the terms of  
9 its Approved Standards.

10 In summary, ACTA UAP violated its procedures for the  
11 selection of apprentices, recruited apprentices outside of the  
12 geographic limitations set forth in the Approved Standards and  
13 used LEAs that were not approved by DAS or set forth in its  
14 Approved Standards.

15 Pending a determination of deregistration under section  
16 212.4, it is appropriate to require ACTA UAP to prospectively  
17 cease and desist from doing or engaging in the following:  
18

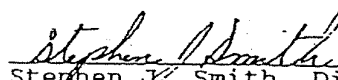
- 19 1. Using apprentice selection methods other than the method  
20 specified in its Approved Standards;
- 21 2. Recruiting apprentices or utilizing selection methods that  
22 result in the recruitment or enrollment of apprentices  
23 outside of Merced, Stanislaus, Mariposa and Tuolumne  
24 counties; and,
- 25 3. Using LEAs that are not set forth in the Approved  
26 Standards.

ORDER

In light of the findings of facts and for the reasons described above, ACTA UAP is hereby ordered to:

1. Comply, in all respects, with its Standards as approved effective August 6, 1993 by the California Apprenticeship Council;
2. Cease and desist from using any apprentice selection methods not expressly approved and set forth in its Approved Standards;
3. Cease and desist from recruiting or utilizing selection methods that result in the recruitment or enrollment of apprentices who reside outside of Merced, Stanislaus, Mariposa and Tuolumne counties; and,
4. Cease and desist from using LEAs other than as set forth in its Approved Standards.

DATED: July 19, 2001

  
Stephen J. Smith, Director

PROOF OF SERVICE

(Code Civ. Proc. §§ 1013a, 2015.5)

Case Name: **SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION  
LOCAL UNION NOS. 104, 108 AND 162 v. AIR  
CONDITIONING TRADES ASSOCIATION UNILATERAL  
APPRENTICESHIP COMMITTEE**

DAS Case Nos. 97-S-11 and 99-13

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 455 Golden Gate Avenue, Suite 9516, San Francisco, California 94102.

On July 23, 2001, I served the DECISION on the parties listed below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit, for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepared, to be deposited in a recognized place of deposit of the U.S. Mail in Sacramento, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of the Department of Industrial Relations, Office of the Director Legal Unit, on the date last written below.

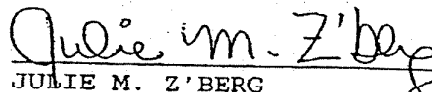
(C) By Messenger Service: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director Legal Unit for messenger delivery, and I caused each such envelope to be delivered to a courier employed by Golden State Overnight, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address at the place and on the date last written below.

(D) By Facsimile Transmission: I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following fax numbers:

TYPE OF SERVICE	ADDRESSEE & FAX NUMBER (IF APPLICABLE)	PARTY REPRESENTED
A	Mark S. Renner, Esq. Wylie, McBride, Jesinger, Sure & Platten 2125 Canoas Garden Ave. Ste. 120 San Jose, CA 95125	SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL UNION NOS. 104, 108 AND 162
A	Mark R. Thierman, Esq. Alice K. Conway, Esq. Thierman Law Firm 120 Green Street San Francisco, CA 94111	AIR CONDITIONING TRADES ASSOCIATION UNILATERAL APPRENTICESHIP COMMITTEE
B	Fred Lonsdale, Esq. Office of the Director P.O. Box 420603 San Francisco, CA 94142	DIVISION OF APPRENTICESHIP STANDARDS
A	California Apprenticeship Council 455 Golden Gate Avenue, 8th Floor San Francisco, CA 94102	SELF

Executed on July 23, 2001, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

  
JULIE M. Z'BERG